

Law Office of G. Anthony Long  
P. O. Box 504970, Second Floor Lim's Bldg.  
San Jose, Saipan, MP 96950  
Telephone No. (670) 235-4802  
Facsimile No. (670) 235-4801

FILED  
Clerk  
District Court

AUG 25 2005

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)

Attorney for Defendant

**IN THE UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN MARIANA ISLANDS**

UNITED STATES OF AMERICA ) CRIMINAL ACTION NO. 04-0009

Plaintiff

v.

PEDRO Q. BABAUTA

Defendant

)  
) REPLY MEMORANDUM  
) SUPPORTING MOTION FOR  
) JUDGMENT OF ACQUITTAL  
) AND NEW TRIAL  
)  
)  
) Date: September 1, 2005  
)  
) Time: 9:30 a.m.

**I. COUNT FIVE CHARGED CONCEALMENT**

The false statement statute, 18 U.S.C. §1001 proscribes two different types of conduct (1) concealment of material facts and (2) false representations. *United States v. Curran*, 20 F.3d, 560, 566 (3<sup>rd</sup> 1994). The Ninth Circuit has recognized that concealment and false representation are “two distinct offenses” with each requiring different elements of proof. *United States v. Mayberry*, 913 F.2d 719, 722 n. 7 (9<sup>th</sup> Cir. 1990). *See United States v. UCO Oil Co.*, 546 F.2d 833, 835 n. 2

(9th Cir.1976), cert. denied, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977).  
False representation requires proof of actual falsity, whereas concealment must be established through evidence of willful nondisclosure by means of a "trick, scheme, or device." *Curran*, 20 F.3d at 566. As established in Babauta's moving memorandum, the Ninth Circuit in *United States v. Murphy*, 809 F.2d 1427 (9th Cir.1987) held that an essential element of a § 1001 violation premised on concealment requires proof that the defendant had a legal duty to disclose the facts allegedly concealed. In fact, the majority of the other Circuits have ruled that a § 1001 violation predicated on concealment requires that the defendant must have had a legal duty to disclose the facts at the time of the alleged concealment. *Curran*, 20 F.3d at 566; *United States v. Crop Growers Corporation*. 954 F.Supp. 335, 344 (D.D.C., 1997); *United States v. Zalman*, 870 F.2d 1047, 1055 (6th Cir.1989), cert. denied sub nom., *Sharifinassab v. United States*, 492 U.S. 921, 109 S.Ct. 3248, 106 L.Ed.2d 594 (1989); *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir.1987), cert. denied, 484 U.S. 958, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir.1986); *United States v. Larson*, 796 F.2d 244, 246 (8th Cir.1986); *United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir.1985); *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir.1981), cert. denied, 455 U.S. 1016, 102 S.Ct. 1709, 72

1 L.Ed.2d 133 (1982). Thus, the prosecution's insinuation that the false  
2 representation and concealment theories of § 1001 do not constitute separate  
3 distinct offenses, Opposition Memo at 3, is contrary to Ninth Circuit precedent.  
4  
5 *See Mayberry*, 913 F.2d at 722 n. 7.

6 The substantive charges against Babauta are set forth in counts 2 through 5  
7 of the superseding indictment. Counts 2 through 5 are based on paragraphs 13 and  
8 14 of the superseding indictment. Paragraph 13 incorporates paragraphs 1 through  
9 12 of the superseding indictment. To this extent, paragraphs 11 and 12 both  
10 contain allegations of concealment. More specifically, the factual basis for count  
11 five is based on concealment and not the submission of a false statement.  
12

13  
14 Count Five concerns the March 6, 2003 submission of the February, 2003  
15 report. The factual allegations supporting count five are set forth in paragraph  
16 12(f) of the superseding indictment. Paragraph 12(f) alleges as follows:  
17

18 [o]n or about March 6, 2003 PEDRO Q. BABAUTA, a./k./a.  
19 "Pete", the defendant, caused CUC to submit a monthly report to  
20 DEQ that **omitted an entire series of samples** taken on February  
21 27, 2003, that showed "positive results" for total coliform  
22 bacteria.(emphasis added).

23 A plain reading of the acts relied upon for Count Five concern concealment. The  
24 evidence submitted at trial with respect to Count Five consisted of the omission of  
25 the February 27, 2003 testing data. Babauta requested an instruction concerning  
26

1 concealment. The prosecution contended that concealment was not at issue in the  
2 case and the concealment instruction was unnecessary. The court agreed with the  
3 prosecution and declined to give the concealment instruction.

4 In opposing Babauta's post trial motion, the prosecution contends that the  
5 jury could have returned a guilty verdict based on the alleged evidence that the test  
6 results from February 13, 27, and 28, were falsified<sup>1</sup>. Opposition Memo at 3. The  
7 prosecution also argues that the jury could have found that the February 28, 2003  
8 test results should have been listed as repeat tests instead of original test results.  
9

10 *Id.* The prosecution's contention at trial and in opposition to Babauta's post trial  
11 motion entitles Babauta to an acquittal as the contentions amount to a concession  
12 that a material variance exists between the indictment and the proof at trial. *See*  
13 *United States v. Tsingnahijinnie*, 112 F.3d 988 (9<sup>th</sup> Cir. 1997). *Tsingnahijinnie*  
14 noted that:  
15

16 [a] defendant is entitled to know what he is accused of doing in  
17 violation of the criminal law, so that he can prepare his defense,  
18 and be protected against another prosecution for the same offense.  
19 The true inquiry, therefore, is not whether there has been a variance  
20 in proof, but whether there has been such a variance as to 'affect  
21 the substantial rights' of the accused. The general rule that  
22

23  
24 This argument misses the mark as Section 1001 prohibits two types of false statements (1) false  
25 representations and (2) concealment of a material fact. Thus, the assertion that the jury could  
26 have found the statement false does not address the issue of whether that finding is based on  
concealment or false representation.

1 allegations and proof must correspond is based upon the obvious  
2 requirements (1) that the accused shall be definitely informed as to  
3 the charges against him, so that he may be enabled to present his  
4 defense and not be taken by surprise by the evidence offered at the  
trial; and (2) that he may be protected against another prosecution  
for the same offense.

5 *Id* at 991. With respect to Count Five, paragraph 12(f) of the superseding  
6 indictment clearly accuses Babauta of violating § 1001 with respect to the  
7 February, 2003 report by concealing an entire series of tests taken on February 27,  
8 2003. This establishes that the grand jury's return on count five was premised on  
9 concealment and not false representation. Concealment, not false representation,  
10 is the notice given to Babauta for Count five and that was the allegation upon  
11 which he prepared his defense. The prosecution claiming the conviction on count  
12 five is proper because the jury could have found false representation, is an  
13 admission of a material variance which warrants acquittal. *See Tsinhnahjinnie,*  
14 *supra.*

15 Alternatively, Babauta should be granted a new trial as the jury was not  
16 instructed on an essential element of concealment, which is whether Babauta had  
17 a legal duty to report the information not disclosed to the DEQ. This failure  
18 greatly prejudiced Babauta as an issue existed regarding whether Babauta had a  
19 duty to report the February 27, 2003 test results in absence of the written  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 monitoring plan required by DEQ regulations. If the jury had received the proposed  
 2 instruction based on *Murphy*, it very well could have returned a not guilty verdict  
 3 on that charge given the uncontroverted evidence that a written monitoring plan  
 4 did not exist.

5  
 6 The prosecution's reliance on *United States v. Milton*, 602 F.2d 231 (9<sup>th</sup> Cir.  
 7 1979) is misguided as that case concerned a jury instruction on intent to defraud in  
 8 a false representation case. It did not involve the issue of concealment as does this  
 9 case. In any event, *Murphy* was decided after *Milton*.  
 10

## 11 12 13 **II. BABAUTA SHOULD BE GRANTED A NEW TRIAL ON COUNTS 4** 14 **AND 5 FOR THE PARTIAL CLOSURE OF THE COURTROOM**

15 Citing the unpublished case of *United States v. Campbell*, 985 F.2d 575 (9<sup>th</sup>  
 16 Cir. 1993) , the prosecution contends the exclusion of Babauta's cousin and Mr.  
 17 Guerrero from the courtroom did not cause a partial closure. Opposition Memo at  
 18 6 - 7. Campbell does not assist the prosecution as it is an unpublished decision and  
 19 pursuant to Circuit 36-3 it can not be cited, used or relied upon in this case. *In Re*  
 20 *Burns*, 974 F.2d 1064, 1067-1068 (9<sup>th</sup> Cir. 1992) *Shaw v. State of Oregon. Public*  
 21 *Employees' Retirement Bd*, 887 F.2d 947, 949 (9<sup>th</sup> Cir. 1989); *People of Territory*  
 22 *of Guam v. Yang*, 850 F.2d 507, 511 (9<sup>th</sup> Cir. 1988). Additionally, in *Campbell*  
 23  
 24  
 25  
 26  
 27  
 28

1 the exclusion was pursuant to an order announced in advance and there was not  
2 any objection to the order after its announcement. In this case, there was not an  
3 order issued by the court giving any instructions about excluding persons from the  
4 courtroom during voir dire. Even more so, there was not notice of any kind given  
5 in advance notifying the defense or the public that persons could be excluded from  
6 the courtroom during voir dire.  
7

8 In *United States v. Ivester*, 316 F.3d 955, 960 (9<sup>th</sup> Cir. 2003) the closure  
9 involved an administrative problem. That is not the circumstance in this case. Jury  
10 voir dire is not an administrative problem, instead it is an integral part of the trial  
11 process. Moreover, none of the cases relied upon by the prosecution involve the  
12 exclusion of a family member. Noticeably, the prosecution does not address the  
13 issue of the exclusion of a family member. This omission is crucial as exclusion of  
14 a family member from the courtroom is the factor which differentiates this case  
15 from *Peterson v. Williams*, 85 F.2d 39 (2<sup>nd</sup> Cir. 1996), on which the prosecution  
16 places much emphasis.  
17  
18  
19  
20

21 *Peterson* is a habeas corpus case arising out of the New York state court  
22 system. In *Peterson*:

23  
24 [t]he defendant brought a direct appeal in the New York courts.  
25 The Appellate Division rejected his appeal, holding that the  
26 defendant's rights were not violated. *People v. Peterson*, 186

1 A.D.2d 231, 587 N.Y.S.2d 770 (2d Dep't 1992). **The court found**  
2 **that only "spectators, rather than members of [petitioner's]**  
3 **family" had been removed from the courtroom**, that the  
4 unauthorized closure had lasted fifteen to twenty minutes, and that  
5 the courtroom was immediately reopened when the mistake was  
6 discovered. 186 A.D.2d at 231, 587 N.Y.S.2d at 771. It  
7 "conclude[d] that it is not necessary, in order to advance the[ ]  
8 purposes [served by a public trial], to require a reversal where the  
9 closure was completely inadvertent, and no evidence was offered  
10 that any observer wishing to enter was excluded." 186 A.D.2d at  
11 232, 587 N.Y.S.2d at 772.


85 F.3d at 42 (emphasis added). A crucial factor underlying *Peterson* was that the  
exclusion did not involve the defendant family members. This case involves  
exclusion of a family member. Even more telling is that Peterson is a 2<sup>nd</sup> Circuit  
case and the 2<sup>nd</sup> Circuit recognizes that , in connection with any courtroom  
closure, a special concern exists with respect to excluding a defendant's family  
members from court proceedings. *See Vidal v. Williams*, 31 F.3d 67, 69 (2d  
Cir.1994)[ "[T]he Supreme Court has specifically noted a special concern for  
assuring the attendance of family members of the accused."]; *Carson v. Fischer*,  
--- F.3d ----, 2005 WL 2009549 at 7 (2<sup>nd</sup> Cir. Aug. 23, 2005)[ "The exclusion of  
courtroom observers, especially a defendant's family members and friends, even  
from part of a criminal trial, is not a step to be taken lightly." ] Thus, *Peterson* and  
the other cases relied upon by the prosecution are not on point as they do not  
concern the crucial factor of exclusion of a family member.

## CONCLUSION

The court should acquit Babauta on count five and grant a new trial on count four. Alternatively, Babauta should be granted a new trial on counts four and five.

Dated this 25<sup>th</sup> day of August, 2005.

Law Office of G. Anthony Long

By:   
G. Anthony Long

LAW OFFICE OF G. ANTHONY LONG  
P.O. Box 504970, 2<sup>nd</sup> Floor Lim's Building  
San Jose, Saipan, MP 96950  
Tel. No: (670) 235-4802 Fax No: (670) 235-4801